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Uninsured Motorist Coverage -- Setoff of Amounts Payable Under Medical Payments Coverage

Peter C. Ray

That the situs of the debt was held to be here in the United States could very easily have been anticipated, due to the lack of any contrary precedents upon which the Court could rely. It has long been the policy of the courts to decide the situs of intangible property on the basis of their concept of justice, rather than on any hard and fast rule of law.[37]

Nor is the fact that the Court found the outstanding power of attorney to be valid very surprising; this, too, is a matter which was decided at the judge's discretion and by his innate sense of justice.

The greatest importance of *Tabacalera* is that it sets a tentative limit to the *Sabbatino* decision, even without the use of the Hickenlooper Amendment. The purpose of the Amendment is to protect American citizens from confiscations of their property by hostile foreign governments;[38] it makes no mention of foreign creditors who seek relief, in American courts, from confiscatory decrees imposed by their own governments. The practical effect of *Tabacalera* is to fill a gap which *Sabbatino* had opened but which the Hickenlooper Amendment had not completely closed.

If for no other reason than that it prevents unjust enrichment, this writer believes the *Tabacalera* decision to be a sound one. A contrary result would not seem to further the concept of justice as it should exist in American courts. Permitting a debtor to refuse to pay a bona fide foreign creditor who is here in the United States, and yet at the same time discouraging him from sending that same debt to the foreign country on the grounds that it is against public policy to trade with unfriendly nations, is a philosophy which should not be sanctioned by any court of law.

GEORGE R. HARPER

UNINSURED MOTORIST COVERAGE—SETOFF OF AMOUNTS PAYABLE UNDER MEDICAL PAYMENTS COVERAGE

The plaintiff-insured was involved in a collision with a negligently operated uninsured vehicle. The defendant-insurer had issued to the plaintiff a policy which included both medical payment and uninsured motorist endorsements, but specifically excepted from payment under the latter coverage amounts paid or payable under the former. The plaintiff sought a declaratory judgment to determine whether the setoff provision con-

37. Needless to say, the problems inherent in determining the location of intangibles will, in many cases, enable the forum to reach virtually any result of its choosing. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS §§ 48, 172 (1962). *See also* § 242 of the same work.

38. The legislative history of the Hickenlooper Amendment leaves no doubt that it intends for international law to require compensation for confiscated American property. *See* S. REP. No. 170, 89th Cong., 1st Sess. 19; 110 CONG. REC. 18936-37, 18946 (1964); 110 CONG. REC. APP. A5157 (1964).

flicted with the coverage required by statute.[1] The District Court of Appeal, Third District, affirmed the trial court's holding that such provisions were consistent with the statute.[2] On certiorari, the Supreme Court of Florida *held*, reversed and remanded: The setoff provision amounted to a reduction of the insurer's limit of liability below the statutory minimum, and further contravened the statute by requiring a showing of unreimbursed loss rather than legal damage. *Tuggle v. Government Employees Insurance Co.*, 207 So.2d 674 (Fla. 1968).[3]

The Supreme Court's decision in *Tuggle* is a further extension of Florida's increasingly restrictive attitude toward insurers' attempts to limit their liability under uninsured motorist coverage. The question of setoff of amounts payable under medical payments arose first in *Sims v. National Casualty Co.*[4] In *Sims*, since there was no provision in the policy for setoff, the district court of appeal held that the coverages were independent and separately contracted for, and the insurer's statutory right of subrogation against the wrongdoer did not imply the existence of a right to such a setoff. The *Sims* court distinguished the Louisiana case of *Gunter v. Lord*[5] where the tortfeasor's insurer was not required to pay

1. FLA. STAT. § 627.0851 (1967):

(1) No automobile liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits described in § 324.021(7), under provisions filed with and approved by the insurance commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage; provided further that, unless the named insured requests such coverage in writing, the coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

(2) For the purposes of this coverage the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency.

(3) An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within one year after such an accident. Nothing herein contained shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to its insureds than is provided hereunder.

(4) In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

2. Tuggle v. Government Employees Ins. Co., 185 So.2d 487 (Fla. 3d Dist. 1966).

3. A companion case arising in the Second District, Damsel v. State Farm Mut. Auto. Ins. Co., 207 So.2d 681 (Fla. 1968), was considered to be factually identical and reversed on the basis of *Tuggle*.

4. 171 So.2d 399 (Fla. 3d Dist. 1965).

5. 242 La. 943, 140 So.2d 11 (1962).

the plaintiff under both medical payment and liability coverages, because the plaintiff in *Gunter* had paid no premiums and was not entitled to collect twice.

The Third District relied on its *Sims* decision in *Hack v. Great American Insurance Co.*[6] The facts were similar except that the plaintiff had paid no premiums. Yet, this did not appear to influence the decision. The court again stressed reliance on the contractual relationship, and the fact that there were no provisions in the policy which made the two coverages mutually exclusive.

The first decision on a related point to be reviewed by the Supreme Court of Florida was *United States Fidelity and Guaranty Co. v. Sellers.*[7] There the district court of appeal had reversed a declaratory decree which allowed plaintiffs recovery under their own uninsured motorist coverage after they had recovered under similar coverage applicable to the automobile in which they were passengers. The plaintiffs' policy contained a provision that its uninsured motorist coverage should apply only as excess insurance over any other coverage available, and only to the extent that the limit of liability exceeded that of the other coverage. The Supreme Court reversed the First District's decision, holding that an insurer might not limit its liability pursuant to the statute by such clauses.[8] The decision stressed, however, that "the statute does not intend that an insured shall pyramid coverages under separate automobile liability insurance policies so as to recover more than his actual bodily injury loss or damage."[9]

At about the same time as the Supreme Court's *Sellers* decision, another limiting clause appearing in most uninsured motorist endorsements was struck down by the First District. In *Standard Accident Insurance Co. v. Gavin,*[10] the court refused to give effect to a clause providing for setoff of workmen's compensation benefits. The Supreme Court denied certiorari,[11] finding that the case was not in conflict with the Third District's decision in *Tuggle* because the amount set off from what the insurer was required to pay under uninsured motorist coverage was "supplied and

6. 175 So.2d 594 (Fla. 3d Dist. 1965).

7. 179 So.2d 608 (Fla. 1st Dist. 1965).

8. Sellers v. United States Fid. & Guar. Co., 185 So.2d 689 (Fla. 1966). But *Sellers* does not stand for the unqualified proposition that where two uninsured motorist coverages apply, *neither* insurer may deny coverage on the ground that the insured has other insurance available. The persons required to be protected under the statute are "persons insured" under the policy's *liability* coverage (*see* note 1 *infra*). As a passenger, Mrs. Sellers was not an insured under the liability coverage of the car in which she was riding, but the standard uninsured motorist endorsement goes beyond the statutory requirement to include passengers. The insurer under that policy in the *Sellers* case had already made a settlement and was not a party to the cause, but there is nothing in the statute to prohibit an "other insurance" provision respecting persons whose protection the statute does not contemplate at all. *See also* Note, 21 UNIV. OF MIAMI L. REV. 712 (1966).

9. *Id.* at 692.

10. 184 So.2d 229 (Fla. 1st Dist. 1966).

11. Standard Accident Co. v. Gavin, 196 So.2d 440 (Fla. 1967).

paid by the *insurer* under the separately contracted for medical payments coverage."[12]

In its review of the *Tuggle* decision, the supreme court receded from this position, saying,

> [W]e find the [*Gavin*] opinion erroneously included the *Tuggle* decision in its pronouncement that "the legal conclusions in each decision . . . are consonant with statutory requirements."[13]

Prior to the supreme court's review of the *Tuggle* decision, but subsequent to its discharge of the writ of certiorari in *Gavin* (where the *Tuggle* decision was apparently distinguished and approved) the First District in *Phoenix Insurance Co. v. Kincaid*[14] decided that a provision in the policy for setoff of medical payments was void because it reduced coverage below the statutory minimum. The court relied largely on the supreme court's reversal of its decision in *Sellers, viz.*, if policy provisions allowing a setoff against uninsured motorist coverage are void where the setoff involves other uninsured motorist coverage, can "a setoff of an entirely separate and independent coverage" for which a separate premium was paid be less void? The decision criticized the Third District's decision in *Tuggle* as "clearly in conflict with the Supreme Court's decision in Sellers and with our decision in Standard Accident Insurance Co. v. Gavin"[15] because, in *Tuggle*, had the offending motorist been insured, the plaintiff "would have been allowed to recover under the medical expense coverage and to recover the identical damages from the offending motorist."[16] The public policy expressed in the *Gavin* decision is that the "insured is entitled to recover under the policy the damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance."[17] Shortly thereafter, a provision for setoff of medical payments was rejected by the Fourth District in *State Farm Mutual Auto. Insurance Co. v. Carrico*[18] on the basis of the supreme court's decision in *Sellers*.

In *Southeast Title and Insurance Co. v. Austin*,[19] the supreme court affirmed a refusal to give effect to a provision for setoff of workmen's compensation benefits from uninsured motorist payments. The court found such provisions to be "in conflict with both express and implied requirements of the law."[20] Justice Barns (retired) resolved a three-to-three deadlock with a concurring opinion which made it clear that he would not re-

12. *Id.* at 442.
13. 207 So.2d 674, 675 (Fla. 1968).
14. 199 So.2d 770 (Fla. 1st Dist. 1967).
15. *Id.* at 774.
16. *Id.*
17. Standard Accident Ins. Co. v. Gavin, 196 So.2d 440, 442 (Fla. 1967). (Quoting from the First District's opinion in Davis v. United States Fid. and Guar. Co., 172 So.2d 485, 486 (Fla. 1965).
18. 200 So.2d 265 (Fla. 4th Dist. 1967).
19. 202 So.2d 179 (Fla. 1967).
20. *Id.* at 181.

gard the case as precedent for a decision like *Tuggle* (with which he vigorously disagreed). The opinion pointed out that both workmen's compensation and uninsured motorist coverage are matters of public policy and that a provision in an uninsured motorist endorsement intended to conform to the statute "providing that the insurer shall receive any benefits paid to the insured pursuant to the workmen's compensation law contravenes the public policy of this state. . . ."[21]

The majority opinion in *Tuggle* found the case indistinguishable from *Sellers*[22] (multiple uninsured motorist carriers) because the two coverages in the *Tuggle* policy were separately contracted for, with independent premiums. The district court's view of the setoff provision as one which reduced the value and quality of the *medical payments* coverage "in a backhanded way"[23] was held to be erroneous, reasoning that if medical payments amounted to $10,000, there would be no *uninsured motorist* coverage whatsoever. This point had been expressed earlier in the *Phoenix*[24] case, where the court expressed the view that in that situation the insurer would retain a statutory right of subrogation in the amount of $10,000 while having paid nothing at all under uninsured motorist coverage. In view of *Tuggle*, it seems unlikely that a court will now be confronted with that situation, but the court's dictum is, at best, arguable. In a strongly worded dissenting opinion, Justice Barns distinguished *Tuggle* from the results in *Southeast*,[25] *Gavin*,[26] and *Sellers*,[27] which were all viewed as proper cases for application of the collateral source rule recognized in Florida.[28] His dissent pointed out that the two coverages and the limitation on double indemnity were a contractual agreement between insurer and insured "under provisions filed with and approved by the insurance commissioner . . . ."[29] The Insurance Commissioner's approval of the limitation was seen as consistent with public policy, since otherwise a higher rate would have been necessary, with a resulting increase in rejections of uninsured motorist coverage, to the detriment of the public welfare.

Although insurers are required by statute to offer uninsured motorist coverage in some 42 states, and offer it voluntarily in virtually all others,[30] there is a scarcity of decided cases on the effect of setoff and "other insurance" provisions on uninsured motorist coverage. Courts of Virginia,[31]

21. *Id.*
22. Sellers v. United States Fid. and Guar. Co., 185 So.2d 689 (Fla. 1966).
23. Tuggle v. Government Employees Ins. Co., 185 So.2d 487, 489 (Fla. 3d Dist. 1966).
24. Phoenix Ins. Co. v. Kincaid, 199 So.2d 770 (Fla. 1st Dist. 1967).
25. Southeast Title and Ins. Co. v. Austin, 202 So.2d 179 (Fla. 1967).
26. Standard Accident Ins. Co. v. Gavin, 196 So.2d 440 (Fla. 1967).
27. Sellers v. United States Fid. and Guar. Co., 185 So.2d 689 (Fla. 1966).
28. *See, e.g.*, Paradis v. Thomas, 150 So.2d 457 (Fla. 2d Dist. 1963).
29. FLA. STAT. § 627.0851(1) (1967). *See* note 1 *supra*.
30. *See* Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. U.L. REV. 497 (1967).
31. Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (1965).

Oregon,[32] and South Carolina[33] have refused to give effect to such provisions, but this by no means makes it certain that these jurisdictions would reach the same result as Florida has on the facts of *Tuggle*. Courts of Louisiana,[34] Illinois,[35] Michigan,[36] California,[37] Iowa,[38] and New Hampshire[39] have approved various exclusionary clauses relating to medical payments, workmen's compensation, and other insurance. Since the cases involve interpretation of statutes which vary from state to state, it would be meaningless to attempt to formulate a "majority" position on the acceptance or rejection of such provisions. Similarly, where a jurisdiction has refused to allow setoff of workmen's compensation benefits, it does not necessarily follow that setoff of medical payments would be disallowed if the fact pattern of *Tuggle* were presented.

It is worth noting, however, that the cases cited where setoff or "other insurance" provisions were not given effect were, for the most part, situations where the result did not lead to recovery exceeding compensation. In *Bryant*,[40] for example, the insured was allowed to recover part of a judgment which had been partially paid by the other insurer. The amount of the judgment greatly exceeded the sum of the insurers' limits of liability. In *Smith*,[41] two "other insurance" clauses were voided because of conflict and the loss prorated between the carriers.[42] In *Vernon*,[43] the court voided an "other insurance" provision in the uninsured motorist endorsement of one policy as in conflict with statutory requirements, but declared that there was no liability on the part of the other insurer because an "other insurance" clause in the collision endorsement of that policy was valid.

The result in *Tuggle* appears to follow logically, if not necessarily, from the public policy expressed by the supreme court in *Gavin*.[44] However, a policy that puts a dollar in the pocket of the injured party for every dollar of compensation for medical expenses, in the face of a contractual undertaking to the contrary, can hardly be applauded as a sound one.

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32. Sparling v. Allstate Ins. Co., 86 Adv. 531 439 P.2d 616 (Ore. 1968); Smith v. Pac. Auto. Ins. Co., 240 Ore. 167, 400 P.2d 512 (1965); Peterson v. State Farm Mut. Auto. Ins. Co., 238 Ore. 106, 393 P.2d 651 (1964).

33. Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964).

34. Morgan v. State Farm Mut. Ins. Co., 195 So.2d 648 (La. 3d Cir. Ct. App. 1967), *writ refused* 250 La. 638, 197 So.2d 897 (1967); LeBlanc v. Allstate Ins. Co., 194 So.2d 791 (La. 3d Cir. Ct. App. 1967); Allen v. United States Fid. and Guar. Co., 188 So.2d 741 (La. 2d Cir. Ct. App. 1966), writ refused 249 La. 743, 190 So.2d 909 (1966).

35. Niekamp v. Allstate Ins. Co., 52 Ill. App.2d 364, 202 N.E.2d 126 (1964).

36. Michigan Mut. Liab. Co. v. Mesner, 2 Mich. App. 350, 139 N.W.2d 913 (1966).

37. Grunfeld v. Pac. Auto. Ins. Co., 232 Cal. App.2d 4, 42 Cal. Rptr. 516 (1965); Northwestern Mut. Ins. Co. v. Rhodes, 238 Cal. App.2d 64, 47 Cal. Rptr. 467 (1965).

38. Burchan v. Farmers Ins. Exch., 255 Iowa 69, 121 N.W.2d 500 (1963).

39. Maryland Cas. Co. v. Howe, 213 A.2d 420 (N.H. 1965).

40. Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (1965).

41. Smith v. Pac. Auto. Ins. Co., 240 Ore. 167, 400 P.2d 512 (1965).

42. *See* Note, *Uninsured Motorist Coverage In Florida*, 14 U. FLA. L. REV. 455 (1962).

43. Vernon v. Harleyville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964).

44. Standard Accident Ins. Co. v. Gavin, 196 So.2d 440 (Fla. 1967).

The numerical frequency of double recoveries arising from the *Tuggle* rule will far outnumber those resulting from workmen's compensation and duplicate uninsured motorist coverages. Indeed, few motorists are incautious enough to venture onto the highways without both uninsured motorist and medical payments coverage. Not only will all those who are so protected be candidates for double recovery, but many, if not most, of the cases that would have been double recoveries because of workmen's compensation or duplicate uninsured motorist coverage will now be triple (and perhaps even quadruple) recoveries.

The difficulty that underlies the announced policy seems to center around the collateral source rule.[45] *Tuggle* and its antecedents place the uninsured motorist carrier exactly in the tortfeasor's shoes; he may not show in mitigation any payment received by the injured party-insured that the tortfeasor himself would not be allowed to show, notwithstanding any contractual undertaking to the contrary between insured and insurer. This seems to stretch the collateral source rule beyond the point where its application can be defended. The rule is usually stated in terms of injured party versus wrongdoer: the tortfeasor may not mitigate damages by showing payment "from a source wholly independent of and collateral to the wrongdoer."[46] The extension from the tortfeasor to his liability insurer is not too difficult to rationalize, though it has been said that the result of this is to give the injured party a windfall he does not deserve at the expense of the premium-paying public.[47] But there is no explanation for extending the basically punitive rule that "the wrongdoer deserves to pay" to an insurer who is doing the paying out of a fund created by the injured party. The fact, relied on by the *Tuggle* majority, that the two coverages were contracted for separately, and *with independent premiums*, is indeed to be deplored; the premium for uninsured motorist coverage should be reduced where there is medical payments coverage and a setoff provision.[48] Moreover, the Insurance Commissioner must, as suggested in the lower court's decision,[49] be relied on to see that reductions in coverage are accompanied by commensurate reductions in premiums.[50]

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45. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962).

46. 22 Am. Jur., *Damages* § 206.

47. *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

48. *See* text accompanying note 23, *supra*.

49. Tuggle v. Government Employees Ins. Co., *supra* note 2 at 489:

> It may be assumed that officials charged with a duty or authority to control rates for premiums will require that in policies containing such a setoff provision the resultant reduction in the value and quality of the *medical payment* coverage (which is what it amounts to) will be accompanied by a proportionate reduction in the premium charged for that coverage. (Emphasis added.)

50. The office of the Insurance Commissioner prepared the following proposed addition to FLA. STAT. § 627.0851, which was introduced at the 1967 Regular Session of the Legislature, but was not enacted:

> 627.0851(5) Nothing contained in this section shall be construed as requiring the forms of coverage provided pursuant to this section to afford more coverage than

It is suggested that this result could have been obtained by a decision of less sweeping impact than the one rendered. The case could have been limited to its facts by holding that a provision for setting off medical payments against uninsured motorist coverage contravenes public policy and will not be given effect *where the lessened coverage is not reflected in an appropriately reduced premium.* When there is a reduction in the premium, the aggregate coverage would certainly be more than that prescribed by the statute, and the cost of that portion of the coverage making up the statutory minimum requirement would presumably not be different from the cost of buying uninsured motorist coverage at a higher premium without medical payment coverage. The fact that the required coverage would, in that case, be supplied under two different endorsements is of no practical significance; the insured is provided with the statutory protection as certainly as if he had bought only uninsured motorist coverage.

Under the *Tuggle* rule, the insured cannot avoid paying an uninsured motorist premium that contemplates a double recovery, even if he does not secure that windfall to himself by buying medical payments coverage. The insurer, on the other hand, can only defend himself against the depredations of an unscrupulous accident victim by shouldering the difficult burden of showing that the expenses incurred were not reasonably necessary. The *Tuggle* decision seems to motivate the insured to unconscionable conduct by forcing him to contract for more than indemnification at a higher premium.

PETER C. RAY

ACCOUNTANT'S LIABILITY TO THIRD PARTIES FOR NEGLIGENCE

The plaintiff had a contract to purchase a large block of stock in the Belcher-Young Corporation with an option to rescind if a certified financial statement revealed that the financial condition of the corporation had changed adversely since the last statement shown to the plaintiff. The defendants, certified public accountants, were engaged by Belcher to conduct the audit and to prepare the financial statements knowing that the plaintiff intended to rely on their certification. The defendants were negligent in the preparation of the financial statements, and the corporation subse-

would be afforded had the insured thereunder been involved in an accident with a motorist who is insured under a policy of liability insurance with the minimum limits provided under § 324.021(7). Such forms of coverage may include such reasonable terms and conditions, including offsets which are designed to avoid duplication of insurance and other benefits, as are commensurate with and reflected in the premium charged therefor. The insurance commissioner shall give due consideration to the coverage afforded in determining whether the premium therefor meets the requirements of Part I of Chapter 627 of the code.

Cf. Fuller, R.S., *A Practical Approach to Florida's Uninsured Motorist Coverage.* LL.M THESIS, University of Miami, 1968.